

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 6245 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA and

MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

MUKESH G GYAL

Versus

UNION OF INDIA

Appearance:

1. First Appeal No. 6245 of 1995
MR GT DAYANI for Petitioner
MR JC SHETH for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA and

MR.JUSTICE H.K.RATHOD

Date of decision: 18/01/2000

ORAL JUDGEMENT (per D.C.Srivastava, J)

This is an appeal against the judgement and

decree dated 23.3.1995 of Third Joint Civil Judge, Mahesana dismissing the suit of the appellant filed under Section 20 of the Arbitration Act. The case has been called out twice in the first sitting and thirdly in the second sitting but none appeared for the respondent. As such, Learned Counsel for the appellant Mr.Dayani was heard.

2. The brief facts are that a contract was entered into between the parties under a written document. The terms of the contract could not be fulfilled by the appellant on the grounds stated in the application and discussed by the Trial Court. Those inabilities were brought to the notice of the authorities of the respondent but of no avail. On the other hand, the contract of the appellant was terminated. There was written agreement between the parties and under clauses 62 & 63 of the General conditions of the contract, there was arbitration clause. The appellant requested the authorities of the respondents for appointment of Arbitrator under Clauses 62 & 63 of the general conditions of the contract. Notice was also given but with no result. Ultimately an application under Section 20 of the Arbitration Act was filed in the Court below by the appellant.

3. The allegations made in the application were controverted in the written statement filed by the defendants-respondents on merits and several legal pleas were also taken by the defendants, regarding the suit being time barred & also being barred for want of notice under Section 80 of the CPC. On merits it was the stand of the defendants-respondents that no dispute arose between the parties which required reference to Arbitration.

4. The Trial Court found that there was written contract between the parties and that the said contract contained arbitration clause as stated by the plaintiff. The Trial court found that the suit was within limitation and it was not bad for want of notice under Section 80 of the CPC. The Trial Court however entered into the merits of the differences between the parties and concluded that those differences were not such disputes which could be referred to arbitration within the ambit of Section 20 of the Arbitration Act and that the defendants proved that the plaintiff is not entitled for reference of disputes to arbitration. With these findings, the suit of the plaintiff-appellant was dismissed. Hence this appeal.

5. For the reasons stated above, i.e.

non-appearance of Shri J.C.Sheth for the respondents, there was no other alternative but to hear the arguments of Mr.Dayani and examine the judgement. Summoning of the record was waived by order dated 5.8.1998. As such for examining clauses 62 & 63 the rules and conditions of the contract we were left with no option but to place reliance upon copy of the agreement produced by Shri Dayani.

6. Since no cross-objection has been filed by the respondents, the findings of the Court below on points no.1,2,4 and 6 require no interference.

7. The only point for consideration in this appeal, therefore, is whether the findings of the Trial Court on point nos. 3 and 5 can legally be sustained or not.

8. For proper appreciation of the provisions of Section 20 of the Arbitration Act, certain clauses have to be recapitulated. Section 20(1) of the Arbitration Act (for short 'the Act') provides that Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. Clauses 2 & 3 of Section 20 are procedural clauses. Clause 4 of Section 20 provides that Where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. In view of the findings of the Trial Court on points no.1 & 2, it is now concluded that there is a written contract between the parties and the said contract contains arbitration clause as stated by the plaintiff i.e. clauses 62 & 63 of the General conditions of the contract.

9. While examining the findings of the Trial Court on points no.3 and 5, we find that the Trial Court has exceeded its jurisdiction in deciding the merits of the case. Whatever was alleged by the plaintiff was denied by the defendant-respondents. Several grounds were taken by the plaintiff-appellant to show as to why the work under contract could not be commenced. Those grounds are reproduced in para 7 of the judgement of the Trial Court and we do not think it expedient to burden this judgement

by reproducing those contentions. Those pleas of the plaintiff-appellant were repudiated by the respondents not only in their written statement but also at the time of arguments. Needless to say that these averments were with respect to the subject matter of the agreement or atleast to the part of the subject matter of the agreement. It could not be said nor it was held by the Trial Court that the differences and disputes raised by the appellant were beyond the terms of the agreement or subject matter of the agreement, if certain factual allegations were made by the appellant arising out of the terms of the agreement and those allegations were repudiated by the defendants then certainly to our mind this substituted differences within the meaning of Section 20(1) of the Act and these differences could safely be called as disputes between the parties arising out of written agreement between the parties. If this was so then the appellant had right under Section 20(1) of the Act to approach the Court through an application under this section. If such application was moved then after following procedure laid down under Clauses 2 & 3 of Section 20, the Court below was required to direct the agreement to be filed. However, there was no necessity for direction to file the agreement because the existence of the agreement and arbitration clause in the agreement was not in dispute from the side of the respondents. What has been done by the Trial Court while answering issues no.3 & 4 is that practically it has taken upon itself the task and jurisdiction of the Arbitrator. Whether those claims set up by the appellant could be sustained or not was a matter to be decided by the Arbitrator and not by the Court deciding an application under Section 20 of the Arbitration Act. While deciding the application under Section 20 of the Act, the Court below was required to consider whether on the basis of *prima facie* allegations made by the appellant and denied by the respondents, was there any difference or were there differences between the parties which could be referred to Arbitrator or not. Whether those differences could ultimately succeed on merits or not was not the function of the Court below while deciding an application under Section 20. The Supreme Court in *Vulcan Insurance Co. Ltd. Vs. Maharaajsingh & Anr.* AIR 1976 SC 827, observed that if the differences which had arisen between the parties was the one to which the arbitration clause in question applied then the application under Section 20 could not be dismissed on the ground that the claim could not ultimately succeed either on facts or in law. The matter was to be left for the decision of the Arbitrator. In *G Ramachandra Reddy & Co. Vs. Chief Engineer (Madras Zone) Military Engineering Services*, AIR 1994, SC Pg.

2381, the apex Court considered as to when a right is given to a party to invoke jurisdiction of the Court under Section 20 of the Arbitration Act for appointment of arbitrator. In this case notice was given to the opposite contracting party to appoint arbitrator. The opposite contracting party failed to take any action in the matter. It was therefore held that such failure gives right to other party to invoke jurisdiction of the Court under Section 20 of the Arbitration Act. This verdict of the Apex Court was brought to the notice of the Trial Court and the Trial Court has casually distinguished the verdict in this case by observing that it does not apply to the facts of the case before it. It was clearly laid down by the Apex Court in this case that when the notice was given to the opposite contracting party to appoint an Arbitrator in terms of the contract and if no action had been taken it must be held that he neglected to act upon the contract. When no agreement was reached, even in the Court between the parties, the Court gets jurisdiction and power to appoint an arbitrator. In the case before us also, notice was given by the appellant to the respondents for appointment of Arbitrator but no action was taken by the General Manager (Western Railways) in the matter. Consequently, the appellant had right to approach the Court below and invoke its jurisdiction under Section 20 of the Act. After examining the judgement under appeal, we are of the view that the Court below has proceeded beyond its jurisdiction in deciding and taking up the merits of the claims of the appellant. We are, therefore, of the view that the application under Section 20 of the Arbitration Act should have been allowed by the Court below and in dismissing the said application, the Lower Court has certainly committed manifest error of law which calls for interference in this appeal. The appeal has therefore, to be allowed.

10. Coming to the procedure to be followed now it is clear from the record that the respondents did not agree to the request of the appellant for appointment of arbitrator. The scope of Sub-Section (4) of Section 20 was considered by the Apex court in the case of G Ramachandra Reddy & Co. (Supra) as well as in Union of India Vs. Prafulkumar Sanyal, AIR 1979 SC 1457.

In Union of India Vs. Prafulkumar Sanyal (Supra), the Apex Court observed that before appointing an Arbitrator by the Court itself, the Court should consider the feasibility of appointing an arbitrator according to the terms of the contract. The terms of the contract before us especially clause 63 of the general

terms and conditions of the contract provide that the General Manager (Western Railways) has to appoint arbitrator, arbitrators and empire keeping in view the involvement of complicated questions and valuation of the subject matter of the claims. In view of these express provisions, we do not think it expedient to take upon ourselves the duty of appointing the arbitrator in this appeal. On the other hand the parties have to be relegated to before the General Manager (Western Railways) Bombay for getting the arbitrator, arbitrators or empire appointed in accordance with clause 63 of the general conditions of the contract.

11. In view of the foregoing discussions, we find that the appeal has to be allowed and is accordingly allowed. The judgement and decree under appeal are set aside. The application under Section 20 of the Arbitration Act moved by the appellant is hereby allowed. The differences and disputes arising between the parties out of the written agreement are referred to the General Manager (Works) Western Railway, Churchgate, Bombay with direction to appoint within a period of 30 days from the receipt of the copy of this judgement, the arbitrator, arbitrators or empire as the case may be keeping in view the provisions of clauses 62 & 63 of the general conditions of the contract between the parties. In case, the General Manager (Western Railways), Bombay does not act in compliance with the directions of the judgement of this Court within a period of 30 days, the appellant shall be at liberty to bring the failure to the notice of this Court, whereupon this Court will readily appoint Arbitrator in the case. No order as to costs.

jitu